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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BARRY C. DELAVAN,
Plaintiff and Appellant,

v.

CITY OF ANTIOCH et al.,
Defendants and Respondents.

A105879

(Contra Costa County
Super. Ct. No. N02-0385)

I.

INTRODUCTION

After repeatedly failing to receive promotion to police sergeant, appellant Barry Delavan brought this writ of mandate under Code of Civil Procedure section 1085 challenging the City of Antioch's (the City) promotional examination, claiming it did not meet the standards required by the City's municipal ordinances or its personnel rules.¹ The court granted the City's motion for summary judgment after finding the undisputed evidence established that the City had fulfilled its obligations under its municipal ordinances and personnel rules to implement a promotional examination that is based upon job duties and that consists of recognized selection techniques. We affirm, finding the trial court properly granted the City summary judgment.

¹ It should be noted at the outset that appellant makes no assertion of a pattern and practice of discrimination against a protected class in the City's promotions to sergeant.

II.

FACTS AND PROCEDURAL HISTORY

The City's police department hired appellant at the rank of police officer in 1984. Six years later, in 1990, the department promoted appellant to the rank of police corporal. Following promotion to corporal in 1990, appellant has repeatedly sought promotion to sergeant. As of March 2002, when the underlying action was filed, appellant had taken the challenged promotional examination for police sergeant in 1992, 1994, 1996, 1998, 1999, and 2003; however, he has never been selected for promotion.

On March 25, 2002, appellant filed the underlying petition for writ of mandate. The petition alleges two causes of action. The first cause of action seeks to compel the City to adopt a competitive promotional procedure that is based on merit and fitness. The second cause of action seeks to compel the City to institute policies that establish an examination process that is based upon the duties of the position sought.

The City filed a motion for summary judgment arguing that it was entitled to prevail, as a matter of law, because the undisputed facts established that the City had already performed all alleged ministerial duties, and appellant could not direct the City's lawful exercise of discretion. The trial court agreed with these arguments, and on January 9, 2004, issued an order granting the City's motion for summary judgment. Appellant appeals from the ensuing judgment.

III.

DISCUSSION

A. Standard of Review

Appellant contends the trial court erred in granting summary judgment in favor of the City. Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant can obtain summary judgment by showing that an element of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (o)(2).) If the defendant makes a prima facie showing that there is no triable issue of material fact, the burden shifts to the plaintiff to make a prima facie showing of a

triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A triable issue of material fact is created by evidence that “would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*, fn. omitted.)

We review a grant of summary judgment de novo, and independently examine the record before the trial court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1258.) In doing so, we must consider all of the evidence and all inferences reasonably drawn from the evidence, viewed in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at p. 843; *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1102.)

B. The City’s Promotional System

In seeking affirmance of the trial court’s grant of summary judgment, the City claims it has been vested with substantial discretion and significant flexibility in devising a promotional test for the rank of sergeant; and the undisputed evidence establishes the City’s broad discretion has not been abused. In considering this argument, we review the substantive provisions governing the City’s promotional examinations.

The City has adopted a municipal code and a personnel system operating within that code. The City’s ordinances and personnel rules both include provisions that establish merit-based standards for employment and promotions. Ordinance section 2-4.112 of the Antioch Municipal Code ² expressly delegates the discretionary authority to promote to the City and its public officials:

“The Council, the City Manager, and any other officer in whom is vested the power to appoint, make transfers, *promotions*, demotions, reinstatements, layoffs, and to suspend or dismiss employees *shall retain such power subject to the provisions of this article and the personnel rules.*” (Italics added.)

² Our review of the City’s municipal code and personnel rules is limited to the excerpts provided by the parties in the record before us.

Ordinance section 2-4.108(A)(1) gives the City's personnel director the sole discretion to rely on any recognized selection technique in a promotional examination:

“Examinations shall be used and conducted to aid in the selection of qualified employees and shall consist of such recognized selection techniques as achievement and aptitude tests, other written tests, personal interviews, performance tests, evaluation of daily work performance, work sampler, or any combination of these, which will, *in the opinion of the Personnel Director, test fairly the qualifications of candidates.*” (Italics added.)

Similarly, Personnel Rule VIII.3 gives the City's personnel director the sole discretion to choose the form and type of competitive examination, so long as a consultation has taken place with the department head, and so long as the examination is based upon the duties of the position:

“Examinations shall be competitive and *be of such form and type as may be deemed appropriate in the judgment of the Personnel Director*, after consultation with the department head, in order to fairly test and determine the fitness and ability of candidates to perform the duties of the class for which they seek appointment. The examination content shall be based upon the duties required for the position.” (Italics added.)

We now examine the mechanics of the police sergeant promotional system devised by the City to meet this criteria. The City's police department administers its promotional exam in conjunction with the City's personnel department. The examination generally consists of three competitive phases: 1) a written pass/fail test; 2) internal “promotability” ratings by supervisors; and 3) oral board interviews conducted by outside law enforcement agencies.

The first component, the written examination, is a state-generated multiple-choice examination that is designed for police departments. The City administers the written test

on a pass/fail basis in order to narrow large applicant pools. When the applicant pool is already small—around 20 applicants—the written examination is not given.³

In the second component, the promotability phase, the City's own police department management personnel rate the candidates who have a subordinate rank. For example, corporals who apply for sergeant are rated only by those with the rank of sergeant through chief. The police department distributes promotability packets to each supervisor, which contain detailed instructions, ratings criteria, and a ratings sheet.

The third component, the oral board phase, consists of a personal interview with the candidate by a panel of oral board raters, all of whom are from outside law enforcement agencies. Before the interviews, the City gives all the oral board raters a copy of the job announcement; each candidate's application materials; rating material that includes detailed ratings instructions, uniform ratings criteria, a ratings score sheet; and a uniform set of confidential core interview questions designed to test suitability for the job. The interviews are monitored by a personnel department representative.

At the end of the promotional examination, the City calculates the promotional and oral board scores and gives each a 50 percent weight. The City then creates an eligibility list that ranks the candidates in order of their combined promotability ratings and oral board ratings scores. Generally, the chief of police makes as many appointments as are necessary to fill vacant positions from the eligibility list in order of ranking.

After examining this tripartate system for making promotions to sergeant, the trial court found that the City had established through undisputed testimony and documentary evidence "its compliance with all of the Municipal Code provisions and Personnel Rules alleged in the Petition."

Appellant claims the court erred in finding the City had performed two of its ministerial duties as a matter of law. As appellant explains: "Ordinance § 2-4:108(A)(1) requires that what ever [*sic*] selection techniques the Personnel Director chooses it must

³ The record in the underlying proceeding indicates that the pass/fail written exam had not been given since 1999 because the candidate pool had been too small.

be a technique that is ‘recognized.’ Personnel Rule VIII.3 mandates that the ‘content’ of examinations must be ‘based upon’ the duties of the position sought. [The City’s] performance of these duties is what is at issue in this appeal.”

C. Request for Mandate Relief

A petition for writ of mandate has long been recognized as the appropriate means by which to challenge a government official’s refusal to implement a duly enacted legislative measure. (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58.) In the matter before us, appellant has challenged the City’s implementation of its municipal ordinances and personnel rules which require the City to devise a promotional examination that is based upon job duties and that consists of recognized selection techniques—a challenge appropriately raised by petition for writ of mandate.

To warrant granting relief, appellant “must plead facts showing that a public body or official has a clear legal and usually ministerial duty and that the [appellant] has a beneficial interest in or right to the performance of that duty. [Citations.] [A] writ of mandate is not available to control the discretion of that public body or official. Although a court may order a public body to exercise its discretion in the first instance when it has refused to act at all, the court will not compel the exercise of that discretion in a particular manner or to reach a particular result. [Citation.]” (*Building Industry Assn. v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645-1646 (*Building Industry*)). In other words, mandate may compel the exercise of discretion but cannot dictate in what manner the discretion is exercised. (*Hollman v. Warren* (1948) 32 Cal.2d 351, 355.)

As a result, whenever a petition for writ of mandate challenges the exercise of discretionary policy-making or legislative authority, the courts have jurisdiction to interfere only if the action taken “ ‘is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law.’ ” (*Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education* (1974) 12 Cal.3d 851, 856.) Conversely, if the court determines that reasonable minds may disagree as to the wisdom of the

challenged action, the court cannot find any abuse of discretion and will uphold the board's determination. (*Manjares v. Newton* (1966) 64 Cal.2d 365, 370-371.)

The City argues that by "adopting broadly-worded duties to govern the content and type of promotional testing, and by expressly conferring discretion upon the Personnel Director" to select testing procedures, a court cannot intervene to nullify its sergeant's promotional examination unless it is clearly shown that the City has abused its discretion. We agree.

As we have seen, the preparation and administration of promotional examinations is a discretionary function delegated most liberally to the City's authorized examiners by the City's municipal ordinances and personnel rules. The fulfillment of that function is a matter requiring special expertise, involving as it does the determination of what job knowledge, skills and abilities are necessary or desirable in a candidate for police sergeant. The City is also entrusted with the highly technical problem of devising a suitable examination which will demonstrate as accurately as possible whether an applicant possesses the attributes deemed necessary to qualify for the position.

However, the City's discretion is not unbridled. The City itself recognizes that to effectuate its goal of devising a fair, merit-based testing process by which candidates are selected for promotion, it must implement a sergeant's promotional examination that is based on job duties and that consists of recognized selection techniques. As appellant points out, "[t]he sole issue to be determined by the courts in this case is whether the[se] alleged ministerial duties [have] been performed as a matter of law."

D. Relationship Between Job Duties of a Police Sergeant and Contents of the Examination

Appellant first claims that the City failed to establish as a matter of law that the contents of the police sergeant promotional examination are based upon the duties of that position as required by the City's Personnel Rule VIII.3.

In this regard, the City's statement of undisputed material facts contains the following assertions: 1) The City designed the promotability ratings criteria to test the skill and ability to perform at the supervisory level sought. 2) The City designed the oral

board core questions to test the candidate's suitability for the position in question. 3) The police chief has observed that top-ranking promotional candidates are effective and competent in the positions to which they are promoted.⁴

The evidence before the trial court which supports these factual assertions provides convincing proof of a high degree of correlation between the promotional examination and important aspects of the job of police sergeant. The City's evidentiary showing on summary judgment contains numerous references to the specific instructions given to those involved in the promotion process instructing them to rate candidates according to the ability to perform the job duties of the position.

The promotability ratings instruct the evaluators to rate each applicant according to his or her ability to perform as a supervisor: "NOTE: AS YOU EVALUATE THE INDIVIDUAL APPLICANT, IT IS IMPORTANT YOU MAINTAIN THE FRAME OF MIND THAT YOU ARE RATING THE INDIVIDUAL ON THEIR ABILITIES AND SUITABILITY TO FUNCTION IN A SUPERVISORIAL CAPACITY, I.E., WHILE THE APPLICANT MAY BE AN ABOVE AVERAGE OFFICER, DOES HE/SHE HAVE THE NECESSARY SUPERVISORIAL TRAITS TO BE A GOOD SUPERVISOR." (Capitalization in original.)

⁴ Appellant criticizes the City's statements of material facts because they did not include the ultimate undisputed "fact" that "the contents of the promotion examinations that Antioch uses for the position of police sergeant are based on the duties of that position" This argument vastly exalts form over substance. " 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for . . . summary judgment to determine quickly and efficiently whether material facts are disputed.' [Citation.]" (*Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 93-94; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) When the City's statements of material fact are considered in the context of the issues that were before the court on summary judgment, their meaning and import were clear and conspicuous. There is no reason to assume, and appellant suggests none, that the court or opposing counsel was confused or misled by the omission of this fact, which would have been mere surplusage.

Before the oral board interviews begin, a police department representative, often the chief, describes the relevant promotional position to the oral board and answers any questions about the duties of the position. The oral board instructions direct oral board panelists to rate candidates on the basis of the relevant job announcement and duties of the position. The instructions state: “It is important to review the job announcement prior to the interviews in order to be aware of the duties and responsibilities of the position. Additionally, a department representative will be available prior to the interviews to answer questions you may have about specific duties. The duties and responsibilities of the position should be your primary guide in making an evaluation of the candidates’ experience, knowledge and training.” Panelists are warned: “The principle of job-relatedness should be used as a guide for asking questions during the interviews. If a question is not job related, it is probably irrelevant and legally questionable.”

These excerpts, all of which are undisputed, overwhelmingly confirm that the evaluators were consistently instructed to articulate important job performance characteristics and to evaluate the candidates on the basis of how they measure up to these characteristics. As a result, the sergeant’s examination does test for job-related criteria as required by the City’s personnel rules.

In response, appellant supplied evidentiary objections that the trial court deemed moot because they were not directed at evidence necessary to its ruling on summary judgment. For example, appellant attacks the declaration of Antioch Police Chief Mark Moczulski as lacking in foundation. The chief’s declaration, however, shows a more than sufficient foundation for his testimony that the ratings criteria are both job-related and good predictors of success in the sergeant’s job. It sets out the chief’s personal involvement with the police department’s promotional process for 18 years, his employment as a sworn officer in the department for 26 years, and his personal involvement in the development of the core questions asked of each applicant during the oral board examination.

Appellant also complains that without knowing the actual questions asked of applicants during the promotional examination, the City's submission of the instructions given to examiners is irrelevant in determining whether the content of the examination is based on job duties. We do not believe it is necessary for this court to engage in a critical supervisory examination of the composition of the questions actually propounded to candidates in the promotional test, especially given the City's expressed desire to keep the core questions asked of all applicants confidential. The instructions and ratings criteria given to the evaluators are sufficient to prove the promotion procedure is based on exactly those knowledge, skill, abilities, and work behavior that comprise the job for which people are being evaluated.

E. Does the Exam Consist of Recognized Selection Techniques?

As we have seen, the promotional process consists of a pass/fail written exam phase, an oral board interview, and "promotability" (supervisor) ratings. Appellant challenges only whether promotability ratings qualify as a "recognized selection technique" as required by Ordinance section 2-4.108(A)(1).

We must therefore read and construe the scope of the provision that defines "recognized selection technique." Ordinance section 2-4.108(A)(1) broadly defines "recognized selection technique" to include: "[S]uch recognized selection techniques as . . . written tests, personal interviews, performance tests, evaluation of daily work performance, work sampler, or any combination of these, *which will, in the opinion of the Personnel Director, test fairly the qualifications of candidates.*" (Italics added.)

Appellant does not dispute what the promotability ratings are. They are individual supervisor assessments of the candidates, that include consideration of their daily work performance. "Evaluation of daily work performance" is one of the selection techniques that is expressly listed in Ordinance § 2-4.108(A)(1). Therefore, promotability ratings fit squarely within the City's definition of a "recognized selection technique."

Moreover, appellant does not pay sufficient heed to the "such as" language in Ordinance section 2-4.108(A)(1). "The phrase 'such as' is not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other

matters of the same kind which are not specifically enumerated.” (E.g., *Donovan v. Anheuser-Busch, Inc.* (8th Cir. 1981) 666 F.2d 315, 327.) The phrase is used in an illustrative, not an exhaustive sense. (*Abbott v. Bragdon* (D. Me. 1995) 912 F.Supp. 580, 586; *Abenante v. Fulflex, Inc.* (D. R.I. 1988) 701 F.Supp. 296, 301.) Thus, Ordinance section 2-4.108(A)(1) legitimizes the use of a myriad of selection techniques not explicitly spelled out, vesting discretion in the Personnel Director to devise a system to “test fairly the qualifications of candidates.”

Therefore, promotability ratings are a recognized selection technique under the City’s ordinances, because: 1) they fit within the specific list of examples of recognized selection techniques that are set forth in the ordinance; and 2) the ordinance gives the personnel director the discretion to use recognized selection techniques other than those listed in the examples.

F. Shift of Burden to Appellant

In moving for summary judgment, the City has met its initial burden of showing it fully complied with its ministerial duties to: 1) base the content of the examination on job duties; and 2) use recognized selection techniques. In response, appellant has offered only unsupported argument or groundless objections to the City’s evidence.

“[G]enerally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at p. 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*, fn. omitted.) Based on the record before us, we conclude that the City succeeded in shifting the burden to appellant to show a triable issue of material fact.

G. Expert Opinion

In an attempt to create a triable issue of disputed fact, appellant presented the declaration of Dr. Larry Meyers, who has “been teaching and doing consulting in the fields of test development and test validation, and measurement and psychometrics for over two decades.” Dr. Meyers was directed to render an expert opinion on the following questions: “(1) Whether the City uses recognized selection techniques . . . [and] (4) [W]hether the content of the examination process test the duties of the position sought, which in this case is police sergeant.”

Dr. Meyers filed a declaration in these summary judgment proceedings. After reviewing the components of the promotional examination used by the City, it was Dr. Meyers’s opinion that the promotability portion of the examination used by the City was not a recognized selection technique. Dr. Meyers explained, “[T]he system adopted by the City fails to meet any professionally recognized validation criteria which must be in place to support it. In particular, the nature of the examination is not derived from job analysis but rather what the police department did in the past” He criticized the oral board process because the evaluators “asked different questions of different candidates and therefore violated the principle of uniform consideration” It was also Dr. Meyers’s opinion that a proper job analysis for the position of police sergeant had not been conducted and that “failing to start with a detailed job analysis is a fatal flaw in claiming that the test is valid.”

The City claimed Dr. Meyers’s declaration was inadmissible, arguing that 1) appellant’s expert was not competent to testify as to the legal interpretation of the scope of the City’s duties under its ordinances and personnel rules, and 2) appellant’s expert could not substitute his discretion for that of the personnel director, who has been granted sole discretion to select appropriate testing methods for the City’s promotional examinations.

The trial court sustained the City’s objection, stating that Dr. Meyers’s opinion was irrelevant: “The Code provides that the Personnel Director decides which combination of recognized selection techniques fairly tests the qualifications of

candidates, and contrary opinions by [appellant's] expert regarding fairness . . . do not raise a triable issue as to noncompliance. The City's evidence also establishes that the exams are competitive, that the process is based on merit and fitness, and that job duties are part of the exams and evaluations. This evidence is not disputed by an expert's opinion regarding standards and analyses not required by the Municipal Code or Personnel Rules alleged."

Given the legal standard at issue and how the ultimate legal conclusion should be determined, the trial court's ruling was unquestionably correct. It is well established that "[t]he interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with the courts." (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310; *Morris v. Harper, supra*, 94 Cal.App.4th at p. 59.) It is equally well established that an expert cannot create a legal obligation to act in a certain manner where none otherwise exists. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 865 ["Courts must be cautious where an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion"]; *Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528 [error to allow expert to testify on whether the suspension of city employees "was in accordance with accepted principles of civil service"]; see generally *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 265-266 [expert testimony irrelevant in determining whether duty existed].)

In a prior section of this opinion, we acknowledged the judiciary's limited role in reviewing the City's determinations regarding test design and implementation. To reiterate, mandate will not issue to compel action unless it is shown "the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment." (*Texas Co. v. Superior Court* (1938) 27 Cal.App.2d 651, 654; *Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 796.) And "[w]hen the duty of a public body is broadly defined, the manner in which it carries out that responsibility ordinarily requires the exercise of discretion; under such circumstances, mandate is not available to

order that public body to proceed in a particular manner.” (*Building Industry Assn. v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1646.)

The provisions at issue indicate that the City has unequivocally reserved for the personnel director the sole discretion to determine the manner and mode of complying with the standards set out in its municipal ordinances and personnel rules. Examinations must be of the form and type “*as may be deemed appropriate in the judgment of the Personnel Director . . . to fairly test . . . the . . . ability of candidates to perform the duties of the [job].*” (Personnel Rule VIII.3.) Examinations must consist of recognized selection techniques “*which will, in the opinion of the Personnel Director, test fairly the qualifications of candidates.*” (Ordinance § 2-4.108(A)(1).) In short, when the City officials enacted these provisions, they left the setting of job-related promotional standards to the Personnel Director’s reasonable judgment.

However, Dr. Meyers’s opinion does not track the language of the legal principles at issue or of the applicable municipal ordinances and personnel rules. Significantly, he never even refers to the controlling language, nor does he claim that the personnel director’s broad discretion was abused. Instead, Dr. Meyers’s declaration directly conveys that he is stating *his own conclusion* that the City did not use recognized selection techniques in making promotions to sergeant and the content of the examination process did not test for the duties of the position. Again, our task is to review the personnel director’s decisions regarding the content and type of promotional test given for sergeant, and if reasonable minds can differ with regard to the propriety of the decisions made, we cannot find an abuse of discretion. (*Manjares v. Newton, supra*, 64 Cal.2d at pp. 370-371.)

The test preparation and administration may not have been ideal. Few things are. While Dr. Meyers may think that certain portions of the process are given too little or too much emphasis, or are not job-related enough, or should be validated, these choices are clearly within the personnel director’s exercise of discretion. Furthermore, there is no evidence that the City’s testing choices are so unreasonable and arbitrary as to constitute an abuse of discretion. In summary, the trial court properly found Dr. Meyers’s opinion

irrelevant because Dr. Meyers's opinion was based upon "standards and analyses not required by the Municipal Code or Personnel Rules alleged."

H. Order Granting Summary Judgment

Finally, there is no merit to appellant's claim that the court's order granting summary judgment did not comply with Code of Civil Procedure section 437c, subdivision (g) because it "does not state the reasons for its decision or identify the supporting evidence" That section provides that upon granting the motion, the court shall, by written or oral order, specify the reasons for its determination. The section also provides, "The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists."

The trial court's reasons for granting summary judgment in this case were clearly stated in its written order. Its reference in that order to the City's statement of facts and evidence was sufficient. (See *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 829-830.) In any event, for purposes of meaningful appellate review, the court's statement of reasons is quite adequate. "Certainly, there is no question about the reason this motion for summary judgment was granted." (*W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1111; see also *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.)

IV. DISPOSITION

The judgment is affirmed.

Ruvolo, J.

We concur:

Haerle, Acting P. J.

Lambden, J.